IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/11/2003

CORAM

THE HON'BLE MR.JUSTICE R.JAYASIMHA BABU
and
THE HON'BLE MR.JUSTICE S.R.SINGHARAVELU

T.C.No.99 of 2000

The Commissioner of Income-tax,
Tamilnadu-III, Madras. ..Applicant

-Vs-

M/s Packwell (Karnataka) Industries,
6,Cathedral Road,
7,madras-86. ..Respondents

Tax Case reference under Sec.256 (2) of the Income-tax Act, 1961,
against the JUDGMENT of the Income-tax Appellate Tribunal, 'A' Bench, Madras,
dated 19.12.1995, made in R.A.No.154/Mds/1996 in ITA No.1866/ Mds/1987.

^For Applicant : Mrs.Pushya Sitaraman

!For respondent : Mr.P.P.S.Janarthanaraja

:JUDGMENT

(Delivered by R.JAYASIMHA BABU, J.)

The assessment year in this case is 1982-83. The question referred is as to whether the Tribunal was right in holding that the remuneration paid by the assessee firm to one of it's partners who was a partner in his capacity as karta of Hindu Undivided Family was not taxable in computing the total income of the assessee firm and that the provisions of Section 40 (b) of the Income-tax Act are not attracted.

2. The amount that was disallowed was paid to one of the partners as a technical consultation fee. Though the assessing officer and the appellate authority did not regard that payment as falling outside the description contained in Section 40 (b), the Tribunal accepted the assessee's appeal and held that that payment was a permissible deduction. Learned counsel for the assessee submitted that a partner in a firm can have more than one role to play and that he can, if he is a person possessed of expertise, make available such expertise to the firm for consideration and that consideration so

received by him would be consideration received by an expert and not by a partner. In support of his submission, he placed reliance on a decision of this Court in the case of Commissioner of Income Tax v. Surendra Manilal Mehta (154 ITR 264).

3. This Court has far back as in the year 1965 in the case of A.S.K.Rathnaswamy Nadar Firm v. Commissioner of Income Tax (58 ITR 312) had, after considering the language contained in Section 10 (4) (b) of the Income-tax Act 1952, which is similar to the language employed in Section 40-(b) of the Income Tax Act, 1961 as it stood during the assessment year 1982-83 observed thus:-

"It is manifest that this sub-section indicates an absolute prescription. It does not limit the operation of the Act to a remuneration paid to a partner as such. It takes within its scope remuneration or salary paid to a partner in any capacity. We are not here concerned with the distinction between his role as a Manager or Karta of the joint family and his role as an individual. The only test that is relevant under Section 10 (4) (b) of the Act is whether the payment is made to a partner or not. We do not think that we can accede to the proposition of the learned counsel for the assessee that when a payment is not made to a partner as partner but in respect of the services rendered by him to the partnership it falls outside the sweep and range of the sub-section".

4. Section 10 (4) (b) of the 1922 Act reads thus:-

"any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm"

5. Section 40 (b) of the 1961 Act as it stood at the relevant time reads thus:-

"..any payment of salary, bonus, commission or remuneration paid to any partner who is not a working partner".

6. The Supreme Court in the case of Rashik lal and Co. v. Commissioner of Income Tax (1997) 229 ITR 458, decided by a two Judge Bench held, that a partner does not act in a representative capacity in a partnership firm and in the assessment of the firm a partner cannot be heard to say that he has not received the commission as a partner of the firm but in a different capacity.

7. It was further held by the Court that a contract of partnership has no concern with the obligation of the partner to others in respect of their shares of profit in the partnership and that Section 40 (b) will apply even if the partner joined the firm as a nominee of a Hindu Undivided Family.

8. Explanation 2 under Sec.40 (b) which was introduced with effect from 1.4.1985 excludes only interest paid by the firm to a partner who is a partner in a representative capacity and who receives the same on behalf of or for the benefit of any other person.

9. Earlier decision of this Court in the case of A.S.K.Rathnaswamy Nadar Firm v. Commissioner of Income Tax (58 ITR 312) which was noticed in the later case in Commissioner of Income Tax v. Surendra Manilal Mehta (154 ITR 264) is in accordance with the law declared by the Supreme Court in the case of Rashik lal and Co. v. Commissioner of Income Tax (229 ITR 458). The law laid down in the case reported in 154 ITR 164 being inconsistent with the decision of the Supreme Court in the case of Rashik Lal, must be held to have been impliedly overruled.

10. On principle as well it is not possible to accept the argument that the statutory prohibition is to be ignored or diluted by regarding a partner to whom remuneration is paid as a person who besides being a partner is something more or something different when he deals with the firm. A partner in a firm is very much a partner and it is that status which defines his rights and also imposes on him the obligation to render all the services that he is capable of for the advancement of the objects of the firm. Such a person cannot seek to avoid the effect of the prohibition made in the statute by describing himself as an expert. any expertise that he may possess is required to be made available to the firm as a partner and even if remuneration therefor is permissible in terms of the partnership deed, nevertheless, having regard to the statutory provision which prevailed until the law was amended in 1992, payment so made cannot be regarded as being items of expenditure so far as the firm is concerned. The question is answered in favour of the Revenue and against the assessee.

To
1.The Assistant Registrar,
Income Tax Appellate Tribunal,
Rajaji Bhavan,
III Floor, Besant Nagar,
Madras-90. (with records) (5 copies)

2.The Secretary,
Central Board of Revenue,
New Delhi. (3 copies)

3.The Commissioner of Income Tax,
Tamil nadu-III, madras.

4.The Commissioner of Income-tax,
(Appeals)-VI, Madras.

5.The Income-tax Officer,
City Circle-VII (9), Madras.

Dev/